

**Introduced by Senators Leno and Steinberg**

February 19, 2010

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An act to amend Section 2923.5 of, and to add and repeal Sections 2923.4, 2923.7, 2923.73, and 2923.75 of, the Civil Code, relating to mortgages.

LEGISLATIVE COUNSEL'S DIGEST

SB 1275, as introduced, Leno. Mortgages: foreclosures.

Existing law requires that, upon a breach of the obligation of a mortgage or transfer of an interest in property, the trustee, mortgagee, or beneficiary record a notice of default in the office of the county recorder where the mortgaged or trust property is situated and mail the notice of default to the mortgagor or trustor. Existing law provides that, after not less than 3 months after the filing of the notice of default, the parties described above may give notice of sale, stating the time and place of the sale, as specified.

Existing law requires, until January 1, 2013, a mortgagee, trustee, beneficiary, or authorized agent to contact the borrower, as defined, prior to filing a notice of default, in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. Existing law requires the notice of default to include a specified declaration from the mortgagee, beneficiary, or authorized agent regarding its contact with the borrower.

This bill would, until January 1, 2013, require a mortgagee, trustee, beneficiary, or authorized agent, prior to the filing of a notice of default, to provide the borrower with an application for a loan modification and other foreclosure avoidance options and a specified notice regarding the borrower's rights during the foreclosure process, subject to specified

exceptions. The bill would require an unspecified state entity to make that notice available in English and specified languages.

This bill would prohibit the mortgagee, beneficiary, or authorized agent from combining collections activity with communication with the borrower about foreclosure avoidance options. The bill would delete the requirement that the notice of default contain a specified declaration, and would instead require the mortgagee, beneficiary, or authorized agent to, concurrently with the filing of a notice of default, record a declaration of compliance that attests to specified facts, and mail the borrower a notice stating that these requirements have been met. The bill would provide that failure to record a declaration of compliance, or recordation of a declaration of compliance that fails to meet the specified requirements, would constitute grounds for the borrower to bring an action to void the foreclosure, or to recover either treble damages or statutory damages in the amount of \$10,000, whichever is greater, from the mortgagee, trustee, beneficiary, or authorized agent, if specified conditions exist.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 2923.4 is added to the Civil Code, to  
2     read:  
3     2923.4. (a) A mortgagee, trustee, beneficiary, or authorized  
4     agent shall provide a borrower with a copy of the notice described  
5     in subdivision (b) and an application for a loan modification and  
6     other foreclosure avoidance options prior to filing a notice of  
7     default pursuant to Section 2924.  
8     (b) A state government entity shall create the following notice  
9     in at least 12-point type and make it available in English and the  
10    languages set forth in subdivision (b) of Section 1632:  
11  
12    “Important Notice Regarding Your Rights And Foreclosure  
13    Avoidance Options: California law requires that you receive this  
14    notice of your legal rights before the foreclosure process begins.  
15    ARE YOU HAVING TROUBLE PAYING YOUR  
16    MORTGAGE?  
17    If you are having trouble paying your mortgage, you should  
18    contact your loan servicer as soon as possible to discuss options

1 for avoiding foreclosure. Your loan servicer is the company listed  
2 on your mortgage bills as the party to which your mortgage  
3 payment should be sent. You are also entitled to receive a telephone  
4 call and a letter from your loan servicer inviting you to discuss  
5 foreclosure avoidance options.

6 **POTENTIAL FORECLOSURE AVOIDANCE OPTIONS**

7 One potential option for avoiding foreclosure is a loan  
8 modification. Your loan servicer may be participating in the federal  
9 loan modification program called the Home Affordable  
10 Modification Program, which has specific requirements and  
11 guidelines. To see if your servicer is participating, or to find out  
12 more about this program, visit  
13 [http://www.makinghomeaffordable.gov/contact\\_servicer.html](http://www.makinghomeaffordable.gov/contact_servicer.html).  
14 Your servicer may also offer other loan modification programs.  
15 You may also qualify for other options for avoiding foreclosure,  
16 including loan refinancing, forbearance, short sale, or a deed in  
17 lieu of foreclosure.

18 With this notice, you should have received an application from  
19 your servicer for a loan modification and other foreclosure relief.  
20 If you request that your loan servicer consider you for a loan  
21 modification or other alternative to foreclosure, your servicer is  
22 required to inform you of its decision before filing a document  
23 called a Notice of Default, which is the first step in the foreclosure  
24 process. If your servicer denies your application, it must send you  
25 a detailed letter describing the reasons for the denial.

26 **THE FORECLOSURE PROCESS**

27 If your servicer has complied with these requirements, but has  
28 denied your application and complied with the contact requirements  
29 described in Section 2923.5 of the Civil Code, it may proceed with  
30 the foreclosure process.

31 **Notice of Default:** Your loan servicer may not foreclose on your  
32 home without filing official documents with the county recorder.  
33 You are entitled to receive copies of those documents. The first  
34 step in the foreclosure process is the filing of a notice of default.  
35 If your loan servicer records a notice of default on your loan, it  
36 must mail you a copy of that notice and must wait at least 90 days  
37 before taking further steps to sell your home.

38 **Notice of Sale:** Once 90 days have passed from the filing of the  
39 notice of default, your servicer may file a notice of sale. Your  
40 servicer must post that notice of sale on your property, mail you

1 a copy of that notice, and wait at least 20 days before selling your  
2 home. Your notice of sale will include the contact information of  
3 the person or company to call if you want more information about  
4 your sale date.

5 Please seek legal help if you believe that you have been denied  
6 your legal foreclosure rights. It is illegal for any person, including  
7 a lawyer, to charge you for helping you with a loan modification  
8 or other effort to avoid foreclosure before providing the services  
9 promised.”

10  
11 (c) This section shall not apply if any of the following occurs:

12 (1) The borrower has surrendered the property as evidenced by  
13 either a letter confirming the surrender or delivery of the keys to  
14 the property to the mortgagee, trustee, beneficiary, or authorized  
15 agent.

16 (2) The borrower has contracted with an organization, person,  
17 or entity whose primary business is advising people who have  
18 decided to leave their homes about how to extend the foreclosure  
19 process and avoid their contractual obligations to mortgagees or  
20 beneficiaries.

21 (3) A case has been filed by the borrower under Chapter 7, 11,  
22 12, or 13 of Title 11 of the United States Code, and the bankruptcy  
23 court has not entered an order closing or dismissing the bankruptcy  
24 case or granting relief from a stay of foreclosure.

25 (d) This section shall apply only to mortgages or deeds of trust  
26 recorded prior to December 31, 2009, that are secured by  
27 owner-occupied residential real property containing no more than  
28 four dwelling units. For purposes of this subdivision,  
29 “owner-occupied” means that the residence is the principal  
30 residence of the borrower as indicated to the lender in loan  
31 documents.

32 (e) This section shall remain in effect only until January 1, 2013,  
33 and as of that date is repealed, unless a later enacted statute, that  
34 is enacted before January 1, 2013, deletes or extends that date.

35 SEC. 2. Section 2923.5 of the Civil Code, as amended by  
36 Section 1 of Chapter 43 of the Statutes of 2009, is amended to  
37 read:

38 2923.5. (a) (1) A mortgagee, trustee, beneficiary, or authorized  
39 agent may not file a notice of default pursuant to Section 2924  
40 until 30 days after initial contact is made as required by paragraph

1 (2) or 30 days after satisfying the due diligence requirements as  
2 described in subdivision (g).

3 (2) A mortgagee, beneficiary, or authorized agent shall contact  
4 the borrower in person or by telephone in order to assess the  
5 borrower's financial situation and explore options for the borrower  
6 to avoid foreclosure. *This communication and attempted*  
7 *communication shall be clearly identified as attempts to initiate*  
8 *discussion with the borrower about foreclosure avoidance options,*  
9 *and may not be combined with collections activity.* During the  
10 initial contact, the mortgagee, beneficiary, or authorized agent  
11 shall advise the borrower that he or she has the right to request a  
12 subsequent meeting and, if requested, the mortgagee, beneficiary,  
13 or authorized agent shall schedule the meeting to occur within 14  
14 days. The assessment of the borrower's financial situation and  
15 discussion of options may occur during the first contact, or at the  
16 subsequent meeting scheduled for that purpose. In either case, the  
17 borrower shall be provided the toll-free telephone number made  
18 available by the United States Department of Housing and Urban  
19 Development (HUD) to find a HUD-certified housing counseling  
20 agency. Any meeting may occur telephonically.

21 ~~(b) A notice of default filed pursuant to Section 2924 shall~~  
22 ~~include a declaration that the mortgagee, beneficiary, or authorized~~  
23 ~~agent has contacted the borrower, has tried with due diligence to~~  
24 ~~contact the borrower as required by this section, or that no contact~~  
25 ~~was required pursuant to subdivision (h).~~

26 *(b) The mortgagee, beneficiary, or authorized agent,*  
27 *concurrently with the filing of a notice of default, shall do both of*  
28 *the following:*

29 *(1) Record a declaration of compliance pursuant to Section*  
30 *2923.7.*

31 *(2) Mail the borrower a notice stating that the requirements of*  
32 *this section have been met. That notice shall be sent by certified*  
33 *mail and shall include the dates and times of, and addresses and*  
34 *telephone numbers used for, the contact or attempted contact*  
35 *required by paragraph (2) of subdivision (a) and subdivision (g).*

36 (c) If a mortgagee, trustee, beneficiary, or authorized agent had  
37 already filed the notice of default prior to the enactment of this  
38 section and did not subsequently file a notice of rescission, then  
39 the mortgagee, trustee, beneficiary, or authorized agent shall, as

1 part of the notice of sale filed pursuant to Section 2924f, include  
2 a declaration that either:

3 (1) States that the borrower was contacted to assess the  
4 borrower's financial situation and to explore options for the  
5 borrower to avoid foreclosure.

6 (2) Lists the efforts made, if any, to contact the borrower in the  
7 event no contact was made.

8 (d) A mortgagee's, beneficiary's, or authorized agent's loss  
9 mitigation personnel may participate by telephone during any  
10 contact required by this section.

11 (e) For purposes of this section, a "borrower" shall include a  
12 mortgagor or trustor.

13 (f) A borrower may designate, with consent given in writing, a  
14 HUD-certified housing counseling agency, attorney, or other  
15 advisor to discuss with the mortgagee, beneficiary, or authorized  
16 agent, on the borrower's behalf, the borrowers financial situation  
17 and options for the borrower to avoid foreclosure. That contact  
18 made at the direction of the borrower shall satisfy the contact  
19 requirements of paragraph (2) of subdivision (a). Any loan  
20 modification or workout plan offered at the meeting by the  
21 mortgagee, beneficiary, or authorized agent is subject to approval  
22 by the borrower.

23 (g) A notice of default may be filed pursuant to Section 2924  
24 when a mortgagee, beneficiary, or authorized agent has not  
25 contacted a borrower as required by paragraph (2) of subdivision  
26 (a) provided that the failure to contact the borrower occurred  
27 despite the due diligence of the mortgagee, beneficiary, or  
28 authorized agent. For purposes of this section, "due diligence"  
29 shall require and mean all of the following:

30 (1) A mortgagee, beneficiary, or authorized agent shall first  
31 attempt to contact a borrower by sending a first-class letter that  
32 includes the toll-free telephone number made available by HUD  
33 to find a HUD-certified housing counseling agency.

34 (2) (A) After the letter has been sent, the mortgagee,  
35 beneficiary, or authorized agent shall attempt to contact the  
36 borrower by telephone at least three times at different hours and  
37 on different days. Telephone calls shall be made to the primary  
38 telephone number on file.

39 (B) A mortgagee, beneficiary, or authorized agent may attempt  
40 to contact a borrower using an automated system to dial borrowers,

1 provided that, if the telephone call is answered, the call is  
2 connected to a live representative of the mortgagee, beneficiary,  
3 or authorized agent.

4 (C) A mortgagee, beneficiary, or authorized agent satisfies the  
5 telephone contact requirements of this paragraph if it determines,  
6 after attempting contact pursuant to this paragraph, that the  
7 borrower's primary telephone number and secondary telephone  
8 number or numbers on file, if any, have been disconnected.

9 (3) If the borrower does not respond within two weeks after the  
10 telephone call requirements of paragraph (2) have been satisfied,  
11 the mortgagee, beneficiary, or authorized agent shall then send a  
12 certified letter, with return receipt requested.

13 (4) The mortgagee, beneficiary, or authorized agent shall provide  
14 a means for the borrower to contact it in a timely manner, including  
15 a toll-free telephone number that will provide access to a live  
16 representative during business hours.

17 (5) The mortgagee, beneficiary, or authorized agent has posted  
18 a prominent link on the homepage of its Internet Web site, if any,  
19 to the following information:

20 (A) Options that may be available to borrowers who are unable  
21 to afford their mortgage payments and who wish to avoid  
22 foreclosure, and instructions to borrowers advising them on steps  
23 to take to explore those options.

24 (B) A list of financial documents borrowers should collect and  
25 be prepared to present to the mortgagee, beneficiary, or authorized  
26 agent when discussing options for avoiding foreclosure.

27 (C) A toll-free telephone number for borrowers who wish to  
28 discuss options for avoiding foreclosure with their mortgagee,  
29 beneficiary, or authorized agent.

30 (D) The toll-free telephone number made available by HUD to  
31 find a HUD-certified housing counseling agency.

32 (h) Subdivisions (a), (c), and (g) shall not apply if any of the  
33 following occurs:

34 (1) The borrower has surrendered the property as evidenced by  
35 either a letter confirming the surrender or delivery of the keys to  
36 the property to the mortgagee, trustee, beneficiary, or authorized  
37 agent.

38 (2) The borrower has contracted with an organization, person,  
39 or entity whose primary business is advising people who have  
40 decided to leave their homes on how to extend the foreclosure

1 process and avoid their contractual obligations to mortgagees or  
2 beneficiaries.

3 (3) A case has been filed by the borrower under Chapter 7, 11,  
4 12, or 13 of Title 11 of the United States Code and the bankruptcy  
5 court has not entered an order closing or dismissing the bankruptcy  
6 case, or granting relief from a stay of foreclosure.

7 (i) This section shall apply only to mortgages or deeds of trust  
8 recorded ~~from January 1, 2003, to December 31, 2007, inclusive~~  
9 *prior to December 31, 2009*, that are secured by owner-occupied  
10 residential real property containing no more than four dwelling  
11 units. For purposes of this subdivision, “owner-occupied” means  
12 that the residence is the principal residence of the borrower as  
13 indicated to the lender in loan documents.

14 (j) This section shall remain in effect only until January 1, 2013,  
15 and as of that date is repealed, unless a later enacted statute, that  
16 is enacted before January 1, 2013, deletes or extends that date.

17 SEC. 3. Section 2923.7 is added to the Civil Code, to read:

18 2923.7. (a) A declaration of compliance shall be attached to  
19 every notice of default filed pursuant to Section 2924. That  
20 declaration shall be signed by an individual having personal  
21 knowledge of the facts stated within and be substantially similar  
22 to the following form:

23  
24 DECLARATION OF COMPLIANCE  
25 BORROWER CONTACT

26 ☐ This loan is not subject to Cal. Civil Code § 2923.5, pursuant  
27 to the following provisions (check all that apply):

28  
29 ☐ Cal. Civil Code § 2923.5(h).

30  
31 ☐ Cal. Civil Code § 2923.5(i).

32  
33 ☐ This loan is subject to Cal. Civil Code § 2923.5, and the  
34 mortgagee, beneficiary, or authorized agent has complied with the  
35 requirements of Cal. Civil Code § 2923.5 by doing the following  
36 (check one):

37  
38 ☐ Making contact with the borrower pursuant to Cal. Civil Code § 2923.5(a)(2)  
39 and sending the letter required by Cal. Civil Code § 2923.5(b).  
40



1    ☐ Satisfying the due diligence requirements described in Cal. Civil Code  
2    § 2923.5(g) and sending the letter required by Cal. Civil Code § 2923.5(b).

3  
4                    FORECLOSURE AVOIDANCE REVIEW

5    ☐ This loan is not subject to Cal. Civil Code § 2923.73.  
6    ☐ This loan is subject to Cal. Civil Code § 2923.73 and (check  
7 one):

8  
9    ☐ The borrower did not submit a written request to modify the loan that is the  
10    subject of the accompanying notice of default or otherwise apply for a loan  
11    modification according to the mortgagee, beneficiary, or authorized agent's  
12    applicable procedures.

13  
14    ☐ The borrower submitted a written request to modify the loan that is the  
15    subject of the accompanying notice of default or otherwise applied for a loan  
16    modification according to the mortgagee, beneficiary, or authorized agent's  
17    applicable procedures, the request was denied, and the mortgagee, beneficiary,  
18    or authorized agent sent the borrower a denial explanation letter in compliance  
19    with the requirements of Cal. Civil Code § 2923.73(a).

20  
21    ☐ The borrower's request to modify the loan that is the subject of the  
22    accompanying notice of default was approved, but the borrower did not accept  
23    the modification offered or did not comply with the terms of the modification.

24  
25  
26    (b) This section shall remain in effect only until January 1, 2013,  
27    and as of that date is repealed, unless a later enacted statute, that  
28    is enacted before January 1, 2013, deletes or extends that date.

29    SEC. 4. Section 2923.73 is added to the Civil Code, to read:

30    2923.73. (a) If a borrower submits a written request for a loan  
31    modification and that request is denied, the declaration of  
32    compliance shall attest to the fact that the mortgagee, trustee, or  
33    other person authorized to take sale sent the borrower a denial  
34    explanation letter by certified mail, at least 15 days prior to  
35    recording the declaration of compliance, which included all of the  
36    following:

37    (1) The date a completed application for a loan modification  
38    was received from the borrower.

39    (2) The date on which a decision was made regarding the  
40    borrower's application.

1 (3) The final decision made by the mortgagee or beneficiary,  
2 which shall indicate what alternatives to foreclosure were  
3 considered, such as forbearance, short sale, deed in lieu of  
4 foreclosure, or modification, and the decision made on each option.

5 (4) If the borrower was considered for a federal Home  
6 Affordable Modification, the information required to be provided  
7 in the borrower notice described in the federal Home Affordable  
8 Modification Guidelines Supplemental Directive 09-08, issued  
9 November 3, 2009.

10 (5) If the borrower was considered for another type of  
11 modification or for an option other than a modification, information  
12 detailing the reasons the borrower did not qualify for each of those  
13 alternatives, including quantitative data supporting the decision.  
14 This documentation may include a finding that the borrower was  
15 previously offered a loan modification and failed to successfully  
16 make payments under the terms of the modified loan.

17 (6) The name and contact information of the holder of the note.

18 (7) Instructions regarding how to dispute the written decisions  
19 described in the denial explanation letter.

20 (b) This section shall not apply if any of the following occurs:

21 (1) The borrower has surrendered the property as evidenced by  
22 either a letter confirming the surrender or delivery of the keys to  
23 the property to the mortgagee, trustee, beneficiary, or authorized  
24 agent.

25 (2) The borrower has contracted with an organization, person,  
26 or entity whose primary business is advising people who have  
27 decided to leave their homes about how to extend the foreclosure  
28 process and avoid their contractual obligations to mortgagees or  
29 beneficiaries.

30 (3) A case has been filed by the borrower under Chapter 7, 11,  
31 12, or 13 of Title 11 of the United States Code, and the bankruptcy  
32 court has not entered an order closing or dismissing the bankruptcy  
33 case or granting relief from a stay of foreclosure.

34 (c) This section shall apply only to mortgages or deeds of trust  
35 recorded prior to December 31, 2009, that are secured by  
36 owner-occupied residential real property containing no more than  
37 four dwelling units. For purposes of this subdivision,  
38 “owner-occupied” means that the residence is the principal  
39 residence of the borrower as indicated to the lender in loan  
40 documents.

1 (d) This section shall remain in effect only until January 1, 2013,  
2 and as of that date is repealed, unless a later enacted statute, that  
3 is enacted before January 1, 2013, deletes or extends that date.

4 SEC. 5. Section 2923.75 is added to the Civil Code, to read:

5 2923.75. (a) Failure to record a declaration of compliance in  
6 accordance with Section 2923.7, or recordation of a declaration  
7 of compliance that does not comply with the requirements of  
8 Sections 2923.7 and 2923.73, shall constitute grounds for a  
9 borrower to pursue either of the following options:

10 (1) If the property that is the subject of the declaration of  
11 compliance is sold to a bona fide purchaser at a trustee sale  
12 conducted in accordance with Section 2924f, the borrower may  
13 recover the greater of treble damages or statutory damages in the  
14 amount of ten thousand dollars (\$10,000) from the mortgagee,  
15 trustee, beneficiary, or authorized agent that failed to comply with  
16 Section 2923.7 or 2923.73.

17 (2) If the property that is the subject of the declaration of  
18 compliance is sold to the foreclosing party at a trustee sale  
19 conducted in accordance with Section 2924f, the borrower may  
20 bring an action to void the foreclosure sale.

21 (b) This section shall remain in effect only until January 1, 2013,  
22 and as of that date is repealed, unless a later enacted statute, that  
23 is enacted before January 1, 2013, deletes or extends that date.

24 SEC. 6. The provisions of this act are severable. If any  
25 provision of this act or its application is held invalid, that invalidity  
26 shall not affect other provisions or applications that can be given  
27 effect without the invalid provision or application.